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IN THE

Supreme Court of the United States

No. 76-63

JAMES E. HOLSHOUSER, GOVERNOR
OF THE STATE OF NORTH CAROLINA,
ET AL.
Appellants

vs.

THE WASHINGTON STATE APPLE
ADVERTISING COMMISSION,
A WASHINGTON STATE AGENCY

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	3
Statement of the Case	3
Summary of Argument	4
Argument	6
I. The court below erred in refusing to dismiss the action because the Washington State Apple Advertising Commission lacked standing to bring the action	6
II. The Court below erred in refusing to dismiss the action because the jurisdictional amount requirement of 28 U.S.C. §1331 was not met	12
III. The court below erred in declaring that N. C. Gen. Stat. §106-189.1 imposed an unconstitutional burden on interstate commerce	14
Conclusion	24

TABLE OF AUTHORITIES

Cases

Page

Barrows v. Jackson, 346 U.S. 249 (1953) ---------- 9

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1950) ---------- 18

Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919) ---------- 15

Data Processing Service v. Camp, 397 U.S. 150 (1970) ---------- 8

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) ---------- 16, 17

Linda R. S. v. Richard D., 410 U.S. 614 (1973) ----- 8

Massachusetts v. Mellon, 262 U.S. 447 (1923) ------ 8

McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936) ---------- 12, 13

NAACP v. Alabama, 357 U.S. 449 (1958) ------- 9, 10

National Motor Freight Traffic Association, Inc. v. U.S., 372 U.S. 246 (1963) ---------- 10

Pacific States Box & Basket Co. vs. White, 296 U.S. 176 (1935) ---------- 5, 15

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) -- 18, 19

Plumley v. Massachusetts, 155 U.S. 461 (1894) -- 15, 16

Page

Price v. Illinois, 238 U.S. 446 (1915) ---------- 15

Sierra Club v. Morton, 405 U.S. 727 (1972) -------- 8

Sligh v. Kirkwood, 237 U.S. 52 (1915) ---------- 5, 15

Simon v. Eastern Kentucky Welfare Rights Organization, ---- U.S. ----, 96 S.Ct. 1917 (1976) ---------- 11, 12

Singleton v. Wulff, ---- U.S. ----, 96 S.Ct. 2868 (1976) ---------- 7, 9

Southern Pacific Co. vs. Arizona, 325 U.S. 761 (1945) ---------- 14, 18

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938) ---------- 12

Warth v. Seldin, 422 U.S. 490 (1975) ---------- 6, 9

Zahn v. International Paper Co., 414 U.S. 291 (1973) ---------- 14

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Article I, Section 8, Clause 3 ---------- 2, 4, 14

28 U.S.C. §1331 ---------- 2, 3, 4, 12, 13

North Carolina Gen. Stat. §106-185 ---------- 20

North Carolina Gen. Stat. §106-189.1 ----- 2, 3, 13, 14, 20

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NO. 76-63

JAMES HOLSHOUSER, GOVERNOR
OF THE STATE OF NORTH CAROLINA, ET AL.

Appellants

vs.

THE WASHINGTON STATE APPLE
ADVERTISING COMMISSION,
A WASHINGTON STATE AGENCY

Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the three-judge District Court appears in 408 F.Supp. 857 (E.D.N.C. 1976) and is printed in the Jurisdictional Statement as Appendix A. The opinion of the single-judge District Court denying the motion to dismiss is printed in the Single Appendix at page 51.*

* All citations to the Jurisdictional Statement are denoted "(Jur. St. . . .)."

* All citations to the Single Appendix are denoted "(A. . . .)."

JURISDICTION

The appeal herein is from a final judgment made and entered in the United States District Court for the Eastern District of North Carolina. The judgment enjoins the enforcement of a state statute. The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1253.

The final judgment was entered April 22, 1976. Notice of Appeal was filed on May 20, 1976, in the United States District Court for the Eastern District of North Carolina. The Jurisdictional Statement was filed on July 16, 1976, and the question of jurisdiction was postponed on October 4, 1976. ____ U.S. ____, 45 U.S.L.W. 3220 (October 5, 1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Commerce Clause, U. S. Constitution, Art. I, §8, cl. 3, provides: "The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

2. 28 U.S.C. §1331(a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

3. The General Statutes of North Carolina §106-189.1, as amended by Chapter 506 of the Session Laws of 1973, provide:

(a) All apples, sold, offered for sale, or shipped into this state in closed containers shall bear on the container, bag or other receptacle no grade other than the applicable U. S. grade or standard or the marking "unclassified", "not graded" or "grade not determined."

(b) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine of not more than Fifty Dollars ($50.00). Each day on which the apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation.

QUESTIONS PRESENTED

1. Did the court below err in refusing to dismiss the action because the Washington State Apple Advertising Commission lacked standing to bring the action?

2. Did the court below err in refusing to dismiss the action because the jurisdictional amount requirement of 28 U.S.C. §1331 was not met?

3. Did the court below err in declaring N. C. Gen. Stat. §106-189.1 unconstitutional as imposing an impermissible burden on interstate commerce and in enjoining the enforcement of the statute insofar as it precluded the display of the Washington State grade on closed containers of apples shipped into the State of North Carolina?

STATEMENT OF THE CASE

North Carolina Gen. Stat. §106-189.1 was duly enacted into law by the General Assembly of North Carolina as a part of the North Carolina Marketing and Branding Farm Products Law. It requires that "no grade other than the applicable U. S. grade" be shown on closed containers of apples sold, offered for sale, or shipped into North Carolina. There is no prohibition against labeling the containers or otherwise advertising thereon that the apples are "Washington State Apples" or those of any other state.

The Washington State Apple Advertising Commission filed suit requesting a declaratory judgment that the statute was unconstitutional and requesting that enforcement of the statute be permanently enjoined.

The District Court overruled appellants' motion to dismiss on the ground that the jurisdictional amount requirement of 28 U.S.C. §1331 was not met and that the Washington State Apple Advertising Commission lacked standing to challenge the statute. After a hearing on the merits, the District Court held that the statute contravened the Commerce Clause of the United States Constitution, and it enjoined enforcement of the statute insofar as it precluded the display of the Washington State grade on closed containers of apples shipped into North Carolina. (Jur. St. B-1).

SUMMARY OF ARGUMENT

North Carolina contends that the Washington State Apple Advertising Commission ("Commission") lacks standing to maintain this action, and that its pleadings establish to a legal certainty that the jurisdictional amount requirement of 28 U.S.C. §1331(a) is not satisfied. The Commission is not a membership organization here asserting the rights of its members. Nor does it have such a "personal stake" in the outcome of the action as to entitle it to rightfully claim standing to maintain the action in its own behalf. Its allegations of injury relate to shippers and growers of Washington State apples, all non-parties to this action. They are under no disability to assert their own interests, and their absence as parties to the action is evidence that the issues are of less importance than the Commission contends and that the Commission is asking this Court to make an unnecessary constitutional determination.

In numerous decisions, this Court has recognized that the states have a special interest in regulating the inspection,

branding and marketing of food products within their borders. *E.g., Pacific States Box & Basket Co. vs. White,* 296 U.S. 176 (1935); *Sligh v. Kirkwood,* 237 U.S. 52 (1915).

North Carolina has legislated in an even-handed manner in requiring that all apples, wherever grown, if sold, offered for sale or shipped into the State, show only the applicable U. S. grade. Enactment of the statute has had several positive effects on the marketing of apples within the State:

> (a.) It has eliminated the sale within the State of apples branded with state grades which utilize the same indicative terms (Extra Francy, Fancy, etc.) as the U. S. grades, but are of inferior quality than apples of the comparable U. S. grade. (A. 76-77)
>
> (b.) It has precluded the possibility that North Carolina would become yet another state utilizing its own separate grading standards for apples.
>
> (c.) It has imposed upon North Carolina growers who pack and ship apples for sale within the State, the requirement that they meet U. S. grading standards, thus imposing standards where there were none previously.
>
> (d.) It has resulted in apples of better quality being shipped into the State for sale there. (A. 77)
>
> (e.) It has been hailed in the report of a team study done for the U. S. Department of Agriculture as a step forward toward introducing a measure of uniformity into the nomenclature of apple grading standards. (A. 88-89)

The statute is consistent with proposals by the U. S. Department of Agriculture to establish a uniform grade

nomenclature for U. S. grades of fresh fruit, vegetables, nuts and other products. (A. 90-94). The many variations in grade names and standards can only result in confusion, even among experienced dealers. The challenged statute imposes one, uniform grading standard for apples sold or shipped into North Carolina in closed containers.

North Carolina contends that enactment of the statute was a valid exercise of the police power, and that the statute does not impose an unconstitutional burden upon interstate commerce.

ARGUMENT

I. *THE COURT BELOW ERRED IN REFUSING TO DISMISS THE ACTION BECAUSE THE WASHINGTON STATE APPLE ADVERTISING COMMISSION LACKED STANDING TO BRING THE ACTION.*

A. THE COMMISSION CANNOT BRING THE ACTION ON BEHALF OF ITS OWN INTERESTS.

The threshold question is whether the Washington State Apple Advertising Commission ("Commission") has standing to invoke the power of the federal judiciary. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Two distinct questions are presented:

> "[F]irst, whether the plaintiff-appellees allege 'injury in fact,' that is, a sufficiently concrete interest in the outcome of their suit to make it a case or controversy

> subject to a federal court's Art. III jurisdiction, and, second, whether, as a prudential matter, the plaintiff-appellees are proper proponents of the particular legal rights on which they base their suit." *Singleton v. Wulff*, ____ U.S. ____, 96 S.Ct. 2868, 2873 (1976).

The first of these questions requires an inquiry as to whether the Commission has alleged that it has suffered "injury in fact" occasioned by operation of the challenged statute. The Commission's pleadings do not allege injury or loss to the Commission itself, but rather to individuals not a party to this action, *e.g.*, growers and shippers of Washington State apples. The function of the Commission is to promote and expand the market for Washington apples. (A. 28). Nowhere in the pleadings does the Commission claim that it grows or ships apples, or that the challenged statute affects its activities. The pleadings reveal a total absence of allegations that the Commission has a sufficiently concrete interest in the outcome of the suit to satisfy the "case or controversy" requirement and permit the federal courts to exercise jurisdiction over the matter. "The Art. III question is one of power within our constitutional system, as courts may decide only actual cases and controversies between the parties who stand before the court." *Id.*, at ____, 96 S.Ct. at 2878. The interest being asserted by the Commission, and to which it claims injury, is the interest of Washington State apple growers and shippers to utilize, without restriction, Washington State apple grades on closed containers of apples. The Amended Complaint alleges only that growers and shippers have incurred additional expense in complying with the challenged statute. North Carolina contends that allegations of injury to Washington shippers and growers are insufficient to establish a case or controversy in the context of this suit, for no Washington State shippers and growers are parties to the action.

This Court has, in recent decisions, expanded the types of "personal stakes" which are capable of conferring stand-

ing on a potential plaintiff. *E.g., Data Processing Service vs. Camp,* 397 U.S. 150 (1970). However, as this Court said in *Sierra Club vs. Morton,* 405 U.S. 727, 738 (1972):

> "[B]roadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."

In referring to the above holding, this Court, in *Linda R. S. vs. Richard D.,* 410 U.S. 614, 617 (1973) said:

> "Although the law of standing has been greatly changed in the last 10 years, we have steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction." (footnotes omitted)

Upon application of this test to the allegations contained in the Amended Complaint, it is apparent that the Commission has failed to allege a sufficient nexus between any injury which it can claim and the statute which it attacks to justify judicial intervention. "The party who invokes [judicial] power must be able to show . . . that he has sustained or is immediately in danger of sustaining some *direct* injury as the result of [a statute's] enforcement." *Massachusetts vs. Mellon,* 262 U.S. 447, 488 (1923) (emphasis added). In the matter before this Court, the Commission has failed to show that it will suffer any injury whatsoever because of the challenged statute and has failed to establish its standing to sue in its own behalf.

B. THE COMMISSION CANNOT BRING THE ACTION AS A REPRESENTATIVE OF WASHINGTON STATE APPLE GROWERS AND SHIPPERS.

The second inquiry referred to in *Singleton v. Wulff,* is a matter of "judicial self-governance"[1] and is reached only if a "case or controversy" is found to exist between the parties. North Carolina contends that even if the Court finds that the Article III requirement is met, it should refuse to entertain this action and adhere to the Court's general rule that "[o]rdinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Barrows v. Jackson,* 346 U.S. 249, 255 (1953).

It should be noted at the outset that the Commission is not a voluntary membership organization, but rather is an agency of the State of Washington. (A. 28) It is financed by assessments levied on all Washington State apple growers according to gross billing weight of apples grown and packed within the State. (A. 28-29) Individual growers cannot participate or refuse to participate according to their own opinions and desires. They are required by law to finance the activities of the Commission, but they do not enjoy membership status in the Commission for no such status exists.

Associations have, on rare occasions, been allowed to assert the rights of their members.[2] In a recent case,[3] this Court said:

> "The possibility of such representational standing, however, does not eliminate or attenuate the constitutional

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[1] *Warth v. Seldin,* 422 U.S. 490, 509 (1975).

[2] *E.g., NAACP v. Alabama,* 357 U.S. 449 (1958).

[3] *Warth v. Seldin,* 422 U.S. 490, 511 (1975).

> requirement of a case or controversy. (Citation omitted.) The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."

Since the Commission is not a membership organization, there are no members for it to represent. Even in those cases where this Court has allowed an organization to represent its members, it has done so only where federal statute acknowledged such organization as the representative of its members,[4] or the organization was acting to protect its members' associational ties.[5]

The Commission has no members whose rights it can assert by representation.[6] It is not an organization engaged in advocacy of a cause so as to require the interposition of

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[4] *National Motor Freight Traffic Association, Inc. v. U. S.*, 372 U. S. 246 (1963) was a per curiam decision in which this Court held that motor carrier associations had standing to challenge an Interstate Commerce Commission order approving a tariff published by a freight forwarder. The Court noted that the motor carrier associations were "authorized under 49 U.S.C. § 5b, and perform significant functions in the administration of the Interstate Commerce Act, including the representation of member carriers in proceedings before the Commission." *Id.*, at 247.

[5] In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court held that an order that the Association produce records including the names and addresses of all its members and agents denied due process and entailed the likelihood of a substantial restraint upon the members' exercise of their rights to freedom of association.

[6] In the opinion denying North Carolina's motion to dismiss, the District Court repeatedly referred to the Commission as the "Association" and treated it as though it were a membership organization. (A. 51)

the Commission between the apple growers and others hostile to their activities in order to protect the rights of the growers. Those individuals for whom the Commission purports to speak are under no disability nor disadvantage to come forward and assert their claims personally, if they so desire. The absence of such involvement by those purportedly aggrieved is some evidence that the controversy which the Commission claims exists is of a lesser magnitude in the minds of those actually affected than the Commission will admit. Their absence suggests that this Court is being asked to make an unnecessary constitutional determination.

The Commission cannot establish its standing by virtue of its particular interest in promoting and advertising Washington State apples. *Simon v. Eastern Kentucky Welfare Rights Organization*, ____ U.S. ____, 96 S.Ct. 1917 (1976), decided last term, is a case in point. That case involved an action brought by low-income individuals, and organizations claiming to represent such individuals, to challenge the validity of Revenue Ruling 69-545 on the basis that it "encouraged" hospitals to deny services to indigents. In discussing the standing issue, this Court said:

> "We note at the outset that the five respondent organizations, which describe themselves as dedicated to promoting access of the poor to health services, could not establish their standing simply on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. (Citations omitted.) Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail." ____ U.S. at ____, 96 S.Ct. at 1925.

Likewise, the Commission here claims standing on the basis of its special interest in the promotion of Washington State apples. The Commission has no greater interest in the out-

come of the controversy than did the organizations in *Simon*. The Commission's claim to standing is weaker than that of the organizations in *Simon* for there "[t]he plaintiff organizations described themselves as an unincorporated association and several non-profit corporations each of which included low-income persons among its members . . ." ____ U.S. at ____, 96 S.Ct. at 1921 (footnotes omitted). The Commission, on the other hand, being a non-membership organization, cannot claim to be composed of members whose claims it is asserting by representation. The individual shippers and growers of Washington State apples are the only ones who can properly assert those claims.

In summary, the Commission's pleadings show clearly that it is attempting to assert the rights of third parties on the basis of its claim to having a special interest in the Washington State apple industry. Decisions of this Court establish that such a special interest is simply not a sufficient basis upon which to claim standing.

II. *THE COURT BELOW ERRED IN REFUSING TO DISMISS THE ACTION BECAUSE THE JURISDICTIONAL AMOUNT REQUIREMENT OF 28 U.S.C. §1331 WAS NOT MET.*

The party invoking the federal court's jurisdiction has the duty of affirmatively alleging jurisdiction; and if his allegations are challenged, he has the burden of establishing jurisdiction.[7] If it appears that the court lacks jurisdiction of the subject matter, the court should dismiss the action.[8]

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[7] *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936).

[8] The test for jurisdictional amount was established by this Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-9 (1938): "The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. * * * But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed."

In order to sustain its claim under 28 U.S.C. §1331, the Commission must show that its right to be free of the regulation imposed by N. C. Gen. Stat. §106-189.1 is worth more than $10,000.00.[9] The Commission has not addressed this question, but has relied upon a broadside allegation that the amount in controversy exceeds $10,000.00. (A. 27). The Commission does allege that it spent in excess of $25,000.00 for advertising and promotion in North Carolina for the 1974 crop year (A. 30), an allegation that does not purport to speak to the jurisdictional amount requirement. There is no allegation that the sums expended for promotion and advertising will be affected in any manner by the outcome of this action. In paragraph 14 of the Amended Complaint (A. 32), the Commission alleges "injury, damage and loss . . . [to] the Washington State apple industry and its individual growers, as represented by plaintiff" in an amount greater than $10,000.00. This is the Commission's only attempt to meet the jurisdictional amount requirement, and its deficiency is apparent. Since the Commission has made no showing in its pleadings or affidavits that *it* has, or will in the future, suffer any monetary injury as a result of the

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[9] In *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 181 (1936), this Court said: "The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed."

operation of the challenged statute, it has failed to establish facts essential to support its jurisdictional claim.

It appears from the pleadings that the Commission is relying upon the aggregated claims of the various growers and shippers in the State of Washington in order to satisfy the jurisdictional amount requirement. North Carolina contends that the Commission cannot under any circumstances aggregate the claims of *non-parties* in order to satisfy the jurisdictional amount requirement. Additionally, North Carolina contends that even were shippers and growers parties to the action, they could not properly aggregate their claims to satisfy the jurisdictional amount requirement.[10]

III. *THE COURT BELOW ERRED IN DECLARING THAT N. C. GEN. STAT. §106-189.1 IMPOSED AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.*

A. IT IS PARTICULARLY APPROPRIATE FOR THE STATE TO REGULATE FOODSTUFFS MARKETED WITHIN THE STATE.

The power to regulate interstate commerce is expressly given to the federal Congress in the Commerce Clause. But in the absence of congressional legislation, "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it."[11]

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[10] See *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which was an action based upon diversity of citizenship. The same jurisdictional amount requirement is imposed, however, under 28 U.S.C. § 1331(a).

[11] *Southern Pacific Co. vs. State of Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945).

In the absence of federal action, the control of the inspection, branding and packing of farm products for market has historically been a matter of local concern, and branding and packaging legislation designed to promote the public health and welfare has almost uniformly been upheld as a constitutional exercise of the police power.[12]

When the health, safety, and welfare of local residents are being protected through a reasonable exercise of a state's "police power", there is a strong presumption that the challenged statute is constitutional. Thus, despite the fact that interstate commerce was affected or burdened to some extent, this Court has upheld state regulations pertaining to food where the chief purpose or effect was to protect local purchasers of food from fraud or deception, *Plumley v. Massachusetts*, 155 U.S. 461 (1894), or from misbranding, *Corn Products Refining Co. v. Eddy*, 249 U.S. 427 (1919), of from unwholesome, impure, or injurious food, *Price v. Illinois*, 238 U.S. 446 (1915).

The case of *Pacific States Box & Basket Co. vs. White*, 296 U.S. 176 (1935) is analogous to the case here under consideration. There an Oregon administrative official's order prescribing standard containers for raspberries and strawberries was upheld. This Court found that the order was an appropriate exercise of the police power of the state, since fixing both the form and dimensions of berry containers might be an important factor in preserving the condition of the berries and would eliminate the confusion to purchasers resulting from a multitude of shapes and sizes of packages. Likewise, North Carolina has sought to reduce the

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[12] *E.g., Sligh v. Kirkwood*, 237 U.S. 52 (1915) (Upheld Florida statute making it a criminal offense to ship immature citrus fruit in interstate commerce.); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935) (Upheld order setting size standards for containers.)

confusion resulting from multiple grade labeling by requiring that only the U. S. grade be shown on closed apple containers.

State regulations pertaining to food have been deemed by this Court as dealing with matters especially appropriate for state regulation. Thus, holding that the commerce clause was not violated by a Massachusetts statute prohibiting the sale of oleomargarine manufactured in imitation of butter, in *Plumley v. Massachusetts, supra,* this Court noted that the states had the power to exclude from their markets any compound manufactured in another state which had been artificially colored or adulterated so as to cause it to look like a different food, thereby defrauding the public; that legislation protecting the public from such fraud in connection with the sale of food could be most advantageously exercised by the states themselves; and that statutes could thus provide such protection without infringing upon the authority of the federal government. It should be noted that *Plumley* upheld the total exclusion of yellow colored oleomargarine from sale in Massachusetts. In comparison, the North Carolina statute under challenge imposes only a uniform grading requirement and does not attempt to exclude the product from sale within the State.

This Court has made no distinction between state regulations aimed at eliminating impure or unsafe foodstuffs and those aimed at eliminating confusion and deception in the marketing of foodstuffs. The case of *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963) is instructive. That case involved an action by Florida avocado growers to enjoin enforcement of a California statute which gauged the maturity of avocados by oil content and prohibited the transportation and sale in California of avocados which contained less than 8% oil by weight. The case presented the question of whether the California statute unconstitutionally excluded Florida avocados certified to be mature under federal regulations but which failed to meet

the California maturity test. The Court noted that the maturity of avocados shipped into California for sale to the public is a matter which is within the regulatory power of the State.

> "[T]he maturity of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence. Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern." 373 U.S. at 144.

Likewise, North Carolina's regulation of the branding of apples sold within its boundaries is properly within the State's scope of supervision. Although not strictly a health measure, the statute is akin to state regulations protecting the health and welfare of the State's citizens. The Court said in *Florida Lime and Avocado*:

> "While it is conceded that the California statute is not a health measure, neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers. (Footnotes omitted). Nothing appearing in the record before us affords any ground for departure in this case from our consistent refusal to draw such a distinction." 373 U.S. at 146.

The North Carolina statute regulates a matter of peculiarly local concern and cannot be distinguished from other statutes enacted to protect the health and welfare of the citizenry of the State.

B. THE TEST TO BE APPLIED IN DETERMINING THE CONSTITUTIONALITY OF THE STATUTE.

This Court's statement of the test to be applied in determining the validity of a state statute under attack as

violative of the Commerce Clause is set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

This is a continuation of the Court's approach in the earlier interstate carrier cases.[13] In those cases, the Court adopted a test which required that the burden imposed on interstate commerce be balanced against the local benefit in order to determine the ultimate question of constitutionality. In *Bibb* and *Southern Pacific* the state statutes were struck down because they imposed requirements that were impossible for the interstate carriers to meet, since various states were imposing incompatible requirements upon them. The national interest in uniformity was the controlling factor in the Court's decisions. North Carolina contends that the national interest in uniformity will be promoted by upholding the challenged statute. The statute encourages the use of one, uniform grading standard in the marketing of apples.

The *Pike* case involved an action by a grower of high quality cantaloupes against an official charged with enforcing an Arizona statute prohibiting the grower from transporting uncrated cantaloupes from its Arizona ranch to a nearby California city for packing and processing. Arizona wanted the cantaloupes packed in Arizona and shipped in containers identifying them as Arizona-grown, thereby enhancing the state's reputation through the reflected good will of the

[13] *E.g., Bibb v. Navajo Fright Lines, Inc.*, 359 U.S. 520 (1950); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

grower's superior produce. Although the Court stated that it recognized the legitimate interest of the State in attempting to maximize the financial return to an industry within the State, it characterized the state's interest in having the company's cantaloupes identified as Arizona-grown as "tenuous."[14] Most importantly, the Court did not consider the statute to be one enacted pursuant to the police power to protect consumers from contaminated, misbranded, or unfit goods. "Its [the statute's] purpose and design are simply to protect and enhance the reputation of growers within the State."[15]

North Carolina contends that the Commission's interest in having the Washington State grade shown on cartons shipped into North Carolina is likewise "tenuous". It cannot reasonably be based upon the right to advertise the product, because the challenged statute does not interfere with the use of printed advertising on the carton. A shipper is free to place "Washington State Apples", or like material, on the shipping carton without restriction.

Although *Pike* involved a food item, it was not a case involving the health, safety and welfare of the citizens of Arizona.[16] The Court, finding only a minimal state interest and a considerable burden on the grower, struck down the statute.

[14] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

[15] *Id.*, at 143.

[16] The Court noted that: "We are not, then dealing here 'with state legislation in the field of safety where the propriety of local regulation has long been recognized,' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State." *Id.*

North Carolina contends that the statute here involved does directly affect the quality of apples which are made available for sale to the citizens of the State, and that there is, therefore, a strong presumption that it is constitutional.

C. THE CHALLENGED STATUTE DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

Less than one percent of the annual Washington State apple crop is shipped into North Carolina. (A. 76) Defendants contend that the burden of complying with its branding laws is *de minimus* and does not rise to the level of constitutional significance. The statute in no way reduces the effectiveness of any means of interstate transportation, as did the statutes involved in the interstate carrier cases. The statute does not inhibit uniformity in the grading of apples shipped in interstate commerce. Indeed, the statute promotes uniformity, a goal which even now is being pursued by the U. S. Department of Agriculture. (A. 90-94)

N. C. Gen. Stat. 106-189.1 is part of Article 17 of the General Statutes, which article is entitled "Marketing and Branding Farm Products". (A. 74) The purpose of the Article is set forth in N. C. Gen. Stat. 106-185 as follows:

> "The purpose of this Article is to give authority to investigate marketing conditions and to establish and maintain standard grades and packages . . . for farm and horticultural crops and animal products."

A large number of states ship apples in interstate commerce and, of those states, a considerable number have their own state grading standards. (A. 75) Among the states having grading standards, there is no uniformity in grading standards but they use the same indicative terms (*E.g.*, Extra Fancy, Fancy, etc.). (A. 75) Washington State is one of

many states which ships apples into North Carolina and the fact that Washington has upgraded its standards is of little constitutional significance. The Washington standards can be changed without legislative action and could be lowered in the future. (A. 76) The Judgment entered by the District Court would prevent enforcement of the statute even if the Washington State grades were openly manipulated from year to year in response to changing market conditions.

The District Court found as a fact that "the existence of multiple, inconsistent state grades pose[s] a danger of confusion in the apple marketing industry." (Jur. St. A-5, F of F. 11). North Carolina has legislated in an even-handed manner in regulating the branding of apples offered for sale within the State in closed containers. All states, including North Carolina, must meet the same uniform requirements. The District Court gave scant attention to the positive aspects of the legislation. The statute imposed upon North Carolina shippers the requirement that U.S. grades be utilized, thus imposing standards where before there had been none. Enactment of the statute meant that North Carolina would not be added to the list of states using their own separate grading standards. After the statute was enacted, the quality of apples shipped into North Carolina improved. (A. 77) The statute gave local growers an incentive to up-grade the quality of fruit they shipped, because they had to meet U. S. standards if they wished to utilize the grades recognized in the industry as reserved only for apples of highest quality (Extra Fancy, Fancy, etc.).

Apparently, the District Court was concerned about the fact that the statute allows the shipment of apples "with no grade at all." (Jur. St. at A-9). This is not an unreasonable provision in the statute, although at first blush it may appear so. The uses of apples are many; the prettiest and tastiest apples of the year's crop are no doubt sold for consumption as fresh fruit. It would be reasonable to expect

that the fruit of lesser quality would be utilized to produce the dried apples, the apple sauce, the apple juice, the apple vinegar, the canned apples, the frozen apples, and other apple products that are produced in this country. The better apples will be inspected, packaged and shipped for sale in the fresh fruit market, and only the apples of lesser quality will be shipped ungraded. The shipper can ship his apples of lesser quality in ungraded lots, but he knows that the price he can expect to receive will be commensurate with the lower quality the buyer will expect to receive.

Additionally, the District Court was concerned that the statute applied only to apples in closed containers. (Jur. St. at A-9). When a buyer purchases apples in a closed container, he must of necessity rely on the grade markings on the carton. The buyer who purchases from open containers, however, is not so confined in determining the quality of the fruit. He can utilize all of his senses to determine if the fruit is of the quality he desires. North Carolina contends that the disparate treatment afforded sales in open containers is based upon rational differences in the ability of the buyer to inspect the fruit he is purchasing. Extension of the statute to open containers would also, as a practical matter, make the statute impractical and unenforceable. If applied to open containers, the statute would require inspection and grading at every little roadside stand where apples are sold to passers-by during the growing season. Obviously, the North Carolina General Assembly did not perceive such an extension of the statute to be needed or workable.

The need for the introduction of uniformity into the area of grades for apples and other fruits and produce is readily apparent. One recommendation of the United States Department of Agriculture team study conducted in 1972 was that state grades be eliminated to "lessen confusion in trading". (A. 88) The study noted that, at that time, 13

states had their own apple grades and standards, but that only Washington was using its grades extensively. It noted that variations in certain requirements lead to confusion in trading, and it said *"Elimination of State grades and adoption of U. S. grades would lessen confusion at the wholesale and retail levels."* (emphasis added.) (A. 82) This is not a study done by some state agency to support protective legislation; it is a study done nationally by a group of impartial experts. It is the State of Washington which is out of step with the rest of the nation in this particular area, not the contrary, as the Commission would have this Court believe. The move toward uniformity in grading standards is a necessity when viewed in the larger context. The United States Department of Agriculture has proposed establishing a uniform grading nomenclature for U. S. grades for fresh fruits, vegetables, nuts and other special products. (A. 90-94) In its proposal the Department notes that "there are 152 grade standards covering 82 fresh fruits and vegetables" that that there are "at least four different terms to describe the top grade" for those 82 fresh fruits, vegetables, nuts and other special products. After adding to this multitude of U. S. grades the various and sundry state grading variations, it is readily apparent that the opportunity for confusion, even among wholesalers and traders, is great. It is a legitimate exercise of the State's police power to attempt to reduce the opportunities for confusion by the even-handed regulation of grading standards.

C. CONCLUSION TO COMMERCE CLAUSE PORTION OF ARGUMENT.

This Court has afforded the states wide latitude in regulating the labeling and marketing of food items sold within their boundaries, food being a matter of primary importance to the local citizenry. The statute here in question imposes a minor burden, at most, on Washington growers. It is nondiscriminatory in nature and is based on a rational

and reasonable desire to standardize grading labels, reduce confusion, and prevent deception. The statute does not impose an unconstitutional burden on interstate commerce and should, therefore, be upheld as a valid exercise of the police power of the State of North Carolina.

CONCLUSION

The decision of the District Court should be reversed and this action should be remanded with instructions to dismiss the complaint.

Respectfully submitted,

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